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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re W. R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. W. R., Defendant and Appellant.	F062737 (Super. Ct. No. JW12466401) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On July 4, 2010, appellant W.R., who was then 16 years old, killed Thaddeus Tanner by hitting him in the back of the head with a small metal table. Although the killing occurred during a verbal and physical altercation between two groups of people in front of Tanner's house, none of the numerous witnesses to the altercation saw Tanner hit anyone during the altercation. Appellant admitted to police that he hit Tanner in the back of the head with the table but claimed Tanner hit him first. Appellant stated that he was trying to protect himself and friends involved in the altercation.

The juvenile court sustained a Welfare and Institutions Code section 602 petition, which alleged that appellant committed premeditated murder (Pen. Code, § 187, subd. (a); count 1), voluntary manslaughter (Pen. Code, § 192, subd. (a); count 2), and assault by means of force likely to produce great bodily injury and/or with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 3). The court found true the allegations, attached to counts 1 and 2, that appellant personally used a deadly or dangerous weapon in the commission of the offenses (Pen. Code, § 12022, subd. (b)). At the disposition hearing, the juvenile court committed appellant to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) and set the maximum period of confinement at life.

On appeal, appellant contends: (1) the juvenile court erred by failing to fix the degree of the offense in count 1; (2) the true finding for count 2 must be reversed because count 2 is a lesser included offense of count 1; (3) count 3 must be stayed or stricken pursuant to Penal Code section 654; (4) the designation that count 3 is an offense listed in Welfare and Institutions Code section 707, subdivision (b), must be stricken; and (5) the restitution order must be amended. We conclude that the juvenile court sufficiently described the offense in count 1 as that of second degree murder to satisfy its degree-fixing obligation but, for purposes of clarification, remand the matter to the court with directions to amend the commitment order to specify the numerical degree of the offense.

Respondent concedes and we agree we must reverse the true finding for count 2. In all other respects, we affirm the juvenile court's judgment.

DISCUSSION

I. Degree of Count 1

The parties on appeal are in agreement that the juvenile court's statements at the jurisdiction hearing indicate the court found appellant committed second degree murder, not first degree murder as alleged in the Welfare and Institutions Code section 602 petition. The court, however, did not affirmatively declare the murder to be second degree murder by numerical description. Consequently, appellant contends the juvenile court erred under California Rules of Court, rule 5.780(e)(5), by failing to fix the degree of the offense in count 1. He further contends "[t]he remedy for the error is remand so the juvenile court may fix the degree of the Count 1 offense" and "includes the option of fixing the offense at manslaughter." Respondent disagrees that such a leniency option is available but otherwise "has no objection to having the juvenile court amend the commitment order to reflect the offense to be second degree murder."

We find no error. Pursuant to California Rules of Court, rule 5.780(e)(5) the juvenile court must make findings on "the degree of the offense and whether it would be a misdemeanor or felony had the offense been committed by an adult."[1] "[T]he requirement of a finding as to the degree of the crime can be satisfied by using a descriptive label as well as by a numerical degree." (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 581 (*Andrew I.*).) "In juvenile proceedings, the statutes and rule are met if, at the end of the jurisdiction hearing, or during the disposition hearing, the court makes a finding as to the degree of the crime either by numerical designation or a sufficiently

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1 Appellant also cites California Rules of Court, rule 5.795(a), which provides: "Unless determined previously, the court [at the disposition hearing] must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult."

clear description of the offense. [Citation.]" (*Andrew I., supra,* 230 Cal.App.3d at p. 581, footnote omitted.)

As the parties on appeal recognize, the juvenile court's findings at the end of the jurisdiction hearing essentially described the crime of second degree murder.[2] Thus, the court stated, in part:

> "I could not, in looking at all of the evidence, find any basis for self-defense or defense of others. I think that it was clear to the Court, and I find beyond a reasonable doubt, that at the time that the minor struck the victim, first, that he caused the death of another person; I find that he acted—that when he acted, he had a state of mind called malice aforethought. That malice was implied malice. He did not have the intent to kill the victim, but he clearly did have the implied malice, and that is, one, that he intentionally committed the act, the natural and probable consequences of the act were dangerous to human life. This table was—is clearly a deadly weapon. And the time he acted, he knew his act was dangerous to human life. I find even at his age at that time, and even the fact that he'd had some beer, that that was clearly a known fact. And I find that he deliberately acted with conscious disregard for human life. [¶] I don't find any basis for him striking this man in the back of the head at that time, other than that he just at that point decided that that was going to be his part in the fight. [¶] So I'm finding all of the elements of a violation of Penal Code section 187 (a) … have been met and proved to my satisfaction and beyond a reasonable doubt. That is a felony conviction, and it is a serious felony …."

The juvenile court's specific findings that appellant acted with implied malice in violating Penal Code section 187, subdivision (a), remove any doubt as to the degree of the murder offense. "[S]econd degree murder with implied malice has been committed

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[2] Although the prosecution's main theory was that appellant committed premeditated murder, the prosecution also presented the second-degree murder theory reflected in the juvenile court's findings. For example, the prosecutor argued: "Now, if the Court were, for some reason, to find that this is not first-degree murder, that the crime was committed without deliberation of premeditation, it has to be second-degree murder. It has to be. The facts support second-degree murder. And all I need to prove for second degree is that the minor killed with malice, it either needs to be express or implied, and that when he acted, he acted with conscious disregard for human life."

'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104, citing *People v. Watson* (1981) 30 Cal.3d 290, 300.) We conclude that *Andrew I., supra,* 230 Cal.App.3d 572 was correctly decided and follow it here to find that the juvenile court's findings at the end of the jurisdiction hearing, while not specifically designating the numerical degree of the offense, nonetheless provided a sufficiently clear description of the offense of second degree murder to satisfy the court's obligation to make a finding on the degree of the crime under California Rules of Court, rule 5.780(e)(5).

As mentioned above, there is no dispute on appeal that the juvenile court found appellant committed second degree murder. The only dispute is as to the scope of the remand for the alleged violation of the applicable court rules. Because we find no violation occurred, remand is not strictly necessary. However, in light of the absence of any objection by respondent and for purposes of enhancing clarity in the record, we will remand with directions to the juvenile court to amend the commitment order to specify the numerical degree of the offense in count 1 (i.e., second degree murder).

Appellant suggests that *In re Dorothy B.* (1986) 182 Cal.App.3d 509 (*Dorothy B.*) and this court's decision in *In re Raymond M.* (1991) 228 Cal.App.3d 1508 (*Raymond M.*), which relied on *Dorothy B.*, are controlling and necessitate a remand to give the juvenile court an opportunity to exercise leniency by fixing count 1 at voluntary manslaughter. We need not resolve the parties' dispute as to whether *Dorothy B.* and *Raymond M.* are still good law after *Andrew I., supra,* 230 Cal.App.3d 572, 582-583, in which the appellate court expressly disavowed the proposition earlier adopted in its prior decision in *Dorothy B.*, that the juvenile court has discretion to reduce the degree of an offense when the evidence supports only the higher degree. We find *Dorothy B.* and *Raymond M.* are inapposite. In *Dorothy B.*, the court stated:

> "[W]e believe [California Rules of Court, rule 1355 (f)(5), a predecessor to rule 5.780(e)(5)] was designed to have a salutary effect for the juvenile. [The rule] permits a juvenile court to wait until it has received dispositional information about the juvenile to determine, when necessary, the degree of the offense or whether it would be a felony or a misdemeanor. Taking all the information into account, the court can then exercise *leniency* by declaring an offense to be of the lesser degree despite the fact the circumstances of the offense *alone* might justify sustaining the petition for a higher degree. In that way, the court, in most cases, can circumscribe the maximum period of confinement." (*Dorothy B.*, *supra*, 182 Cal.App.3d at pp. 520-521.)

As discussed above, the record here indicates the juvenile court was aware of its obligation to make findings as to the degree of the offense in count 1, and fulfilled that obligation at the jurisdiction hearing by making findings that sufficiently described the offense of second degree murder. Furthermore, as respondent observes and appellant does not dispute, the record of the disposition hearing reflects the juvenile court *was* aware of its discretion to exercise leniency by choosing a lower term than the statutorily proscribed maximum period of confinement but opted not to exercise that discretion in appellant's favor. The court also denied the defense's motion to reconsider its jurisdictional ruling, which motion asked "the court to find either perfect self-defense or at the most, involuntary manslaughter on the part of the minor." On this record, we do not believe *Dorothy B.* requires a remand with directions to the juvenile court that it has the option of exercising leniency by declaring the offense in count 1 to be something less than second degree murder. The record here indicates the juvenile court was aware of all its discretionary powers and, thus, this case does not implicate the concerns raised in *Dorothy B.* and the few decisions that follow it. (See e.g., *In re Jacob M.* (1987) 195 Cal.App. 3d 58, 63 ["Where a judge has failed to make an express finding of degree, it is possible the judge has overlooked his or her discretion on this issue."].)

II. Count 2 a Lesser Included Offense of Count 1

Appellant contends the juvenile court erred in returning a true finding for count 2 because voluntary manslaughter is a lesser included offense of murder. Respondent

concedes and we agree the juvenile court erred in this regard. (*People v. Booker* (2011) 51 Cal.4th 141, 181 [voluntary manslaughter is a lesser included offense of murder]; *People v. Lewis* (2008) 43 Cal.4th 415, 518 ["multiple convictions may not be based on necessarily included offenses arising out of a single act or course of conduct"].) Therefore, we will reverse the true finding on count 2.

III. Penal Code Section 654

Appellant contends count 3 (assault by means of force likely to produce great bodily injury and/or with a deadly weapon) must be stayed or stricken pursuant to Penal Code section 654, because counts 1 and 3 were based on "appellant's single act of striking the victim with the table."

Penal Code section 654 states an act punishable in different ways by different provisions of the Penal Code may be punished under only one such provision. The section, however, applies not only to a single act violating multiple provisions of the code but also to an indivisible course of conduct violating several statutes. Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. If all the criminal acts were incident to one object, then punishment may be imposed only as to one of the offenses committed. (*People v. Beamon* (1973) 8 Cal.3d 625, 636-637; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Penal Code section 654 has a limited application in delinquency cases. Welfare and Institutions Code section 726, subdivision (c), states that a minor removed from the custody of his or her parents cannot be held in physical confinement for a period longer than the maximum term of imprisonment that could be imposed on an adult convicted of the same offenses. Since the calculation of a term of imprisonment involves application of Penal Code section 654, that section is necessarily applicable to the calculation of a ward's maximum allowable period of physical confinement. However, since Welfare and Institutions Code section 726, subdivision (c), is concerned with actual periods of confinement and not concepts of double punishment, there is no necessity that a juvenile

court employs the rubric of staying the term of confinement for one of two offenses to which Penal Code section 654 applies. It is merely necessary that the term not be used to calculate the maximum period of physical confinement. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 474-475; *In re Robert W.* (1991) 228 Cal.App.3d 32, 34; *In re Billy M.* (1983) 139 Cal.App.3d 973, 978-979.)

As the parties recognize, the record shows the juvenile court found Penal Code section 654 applied to count 3. Consequently, the court did not include any time for count 3 when it calculated appellant's maximum term of confinement. The court's actions thus satisfied the requirements of Penal Code section 654 in the delinquency context, and we find unpersuasive appellant's arguments to the contrary.

IV. Welfare and Institutions Code Section 707, subdivision (b)

Appellant contends the juvenile court erred in designating count 3 as a violation coming within Welfare and Institutions Code section 707, subdivision (b).[3]

In attachment 6 to the commitment order, the juvenile court designated counts 1 and 3, but not count 2, as violations coming within section 707, subdivision (b). Thus, under the column titled "707(b)," the words "Yes" appear with respect to counts 1 and 3, and the word "No" appears with respect to count 2.

California Rules of Court, rule 5.805 provides, in relevant part:

> "If the court orders the youth committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ): [¶] (1) The court must complete Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (form JV-732). [¶] (2) The court must specify whether the offense is one listed in section 707(b)." (Italics omitted.)

Section 707, subdivision (b), is a list of serious crimes. A determination by the juvenile court that the violation resulting in a true finding on a section 602 petition is a

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3 Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

crime listed in section 707, subdivision (b), has several consequences. Among them are that the court's jurisdiction over the person is extended from age 21 to age 25 (§ 607, subd. (b)), and that the true finding is a "strike." (Pen. Code, § 667, subd. (d)(3)(A)-(D).)

One of the violations listed in section 707, subdivision (b), is "assault by any means of force likely to produce great bodily injury." (§ 707, subd. (b)(14).) Subdivision (b)(14) has been interpreted to include both forms of assault defined in Penal Code section 245, subdivision (a)(1), i.e., assault with a deadly weapon or by any means likely to produce great bodily injury. (*In re Pedro C.* (1989) 215 Cal.App.3d 174, 182.) In this case, count 3 alleged both forms of assault under Penal Code section 245, subdivision (a)(1), the juvenile court made a true finding on that count and designated it a section 707, subdivision (b), violation in the commitment order.

Appellant does not argue directly that the designation of count 3 as a crime listed in section 707, subdivision (b), was legally incorrect. Rather, he claims the designation in this case "should be viewed as a clerical error" and stricken from the commitment order. Appellant observes that, at the disposition hearing, the juvenile court stated that two of the counts were listed under section 707, subdivision (b) but did not specify which counts. The probation officer's report was similarly nonspecific. Appellant concludes that the juvenile court must have been referring to counts 1 and 2, not count 3. This is so, appellant asserts, because "[m]urder and voluntary manslaughter are plainly within section 707(b)" and "[b]y contrast, a section 245(a)(1) offense committed with a deadly weapon that is not a firearm, is not listed under section 707(b) although section 707(b)(14) does list 'assault by any means of force likely to produce great bodily injury.'"

The observations offered by appellant do not establish clerical error. The juvenile court's comments at the jurisdiction hearing indicate the court believed (correctly) count 2 was subsumed in count 1. Thus, the court's failure to designate count 2 as a section 707, subdivision (b) offense is not inconsistent with the court's view that count 2 was

made "moot" by its true finding on count 1.[4] For reasons discussed above, the true finding on count 2 must be stricken because it is a lesser included offense of count 1. This leaves counts 1 and 3, both of which were properly designated as section 707, subdivision (b) offenses. We find no basis to conclude that any error occurred when the court completed the commitment order as required under California Rules of Court, rule 5.805.

We also reject appellant's assertion that California Rules of Court, rule 5.805's requirement that the juvenile court specify whether an offense is listed in section 707, subdivision (b), "does not apply when, as here, the offense is not the basis for the juvenile's [DJJ] commitment and has no impact upon upon the juvenile's maximum term of confinement." This claim is without supporting authority and based on an inapt analogy to Penal Code section 654.

V. Restitution

Appellant's last contention on appeal (i.e., that the commitment order must be amended to reflect a restitution amount of $25,843.48) appears to be moot. The juvenile court has since provided this court with notice showing it has made the amendment requested by appellant and provided a copy of the amended commitment order to the DJJ.

DISPOSITION

The true finding on count 2 is reversed. The matter is remanded to the juvenile court to amend the commitment order to specify the numerical degree of the offense in count 1 (i.e., second degree murder) and to strike the court's true finding on count 2 (voluntary manslaughter). In all other respects, the judgment is affirmed.

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[4] The juvenile court observed at the jurisdictional hearing that it did "not need to make findings as to count 2" because "[c]ount 2 is a lesser-included within [count 1]." However, the court did proceed to return a true finding on count 2.

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Hill, P.J.

WE CONCUR:

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Levy, J.

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Poochigian, J.